No. 17-685

IN THE

Supreme Court of the United States

JHARILDAN VICO,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY TO THE OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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April 12, 2018

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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STATEMENT OF THE CASE

Petitioner Jharildan "Harold" Vico, a Cuban-American citizen, was convicted of one count of conspiracy to commit mail fraud, twelve counts of mail fraud, one count of conspiracy to commit money laundering, and two counts of money laundering.

At trial, the prosecutor asked a government witness, Joel-Simon Ramirez, did he find "people from a specific part of the community to participate in these crimes?" Ramirez responded, "[p]referably that they were from here, West Palm Beach." J.A. at 46. Unsatisfied with this answer, the prosecutor asked, "[a]nd were they from a specific ethnic group[?]" *Id.* The defense objected that the prosecutor was "implicating an entire ethnic group." J.A. at 47. The prosecutor then rephrased the question and asked Ramirez, "[a]re you familiar with the Cuban people here in West Palm Beach?" *Id.* The prosecutor continued on this line of questioning, asking what percentage of the witness's clientele were from the Cuban community, and whether they seemed "to know each other." *Id.* The prosecutor next asked: "[w]as there a reason why 98 percent of your clientele was from the Cuban community?" *Id.* The defense objected. Again, instead of dropping the line of questioning, the prosecutor reframed the question: "Mr. Simon-Ramirez, do you know why 98 percent of your clientele came from the Cuban community?" J.A. at 48. Ramirez responded, "[y]es" and the prosecutor again asked, "[w]hy?" *Id.* The court overruled the objection and Ramirez responded, "[b]ecause Cubans are always looking for money, they are looking for the easiest way to get money." J.A. at 49.

At the conclusion of trial, the jury returned a general guilty verdict on all counts, with no specific

factual findings. J.A. at 50. Had the district court imposed a sentence based only on the loss amount — less than $40,000 — proven at trial, Petitioner's sentence would have ranged between forty-one to fifty-one months. Instead, relying on §§ 1B1.3(a)(2) and 2B1.1(b)(1) of the United States Sentencing Guidelines Manual (the Guidelines), the district court found by a mere preponderance of the evidence that defendant's conduct was part of the same course of conduct as the offense of conviction, finding a total loss of $1.87 million. As a result, the court raised the applicable range of Petitioner's sentence to 121-151 months.

In his opening *pro se* brief, Petitioner identified two issues that raised significant constitutional questions regarding the fairness of his trial and sentencing: (1) whether, in light of *Pena-Rodriguez v. Colorado* and *Buck v. Davis*, the structural error standard of *Arizona v. Fulminante,* rather than the harmless-error rule, should apply in reviewing the prosecution's injection of racist stereotypes in a criminal trial; and (2) whether the district court erred when determining the loss amount relevant for Petitioner's sentence in light of *Apprendi v. New Jersey* and *United States v. Booker*, by relying on judicial factfinding by a preponderance of the evidence to increase a defendant's sentence under § 1B1.3(a)(2) of the Guidelines when those facts were never proven beyond a reasonable doubt at trial nor admitted by the defendant.[1]

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[1] In his opening brief Petitioner cited to *Buck* and *Pena-Rodriguez* to support his claim that the racist testimony denied him a fair trial. In response, the government relied on the harmless error rule to excuse the testimony. It is therefore wholly appropriate for Petitioner to refer to the structural error doctrine in reply to the government's brief in opposition. As to

In response, the Government maintains that any racially defamatory statement it may have elicited at trial amounts to harmless-error, and that Petitioner's sentence was correctly calculated under appropriate provisions of the Guidelines. In so doing, the Government sidesteps two constitutional questions this Court has yet to answer.

As to the first question, this Court has never held that a prosecution's injection of the toxin of racist or ethnic stereotypes in a criminal trial may be excused by harmless-error. To the contrary, this Court's recent decisions in *Buck v. Davis* and *Pena-Rodriguez* have made it clear that racial animus at trial, "if left unaddressed, would risk systemic injury to the administration of justice." 137 S.Ct. 855, 868 (2017). Therefore, the Court should review this case to consider whether the application of the structural error standard of *Arizona v. Fulminante* is a more appropriate remedy for the intractable consequences of the injection of race at trial because the right at issue protects an interest other than preventing an erroneous conviction; the effects of the error are "simply too hard to measure;" and the error always results in "fundamental unfairness." *Weaver v. Massachusetts,* 137 S.Ct. 1899, 1908 (2017). If, as this Court stated in *Buck*, a racist stereotype is a toxin that can be fatal even in small doses, harmless-error is not — and can never be — the antidote. *See Buck v. Davis,* 137 S.Ct. 759, 777 (2017).

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the sentencing question, Petitioner challenged, and the opposition brief acknowledged, the district court judge's factual findings that enhanced his sentence without explicit reference to the *Apprendi* doctrine. However, a fair reading of petitioner's *pro se* opening brief is that the district court's use of relevant conduct to enhance his sentence amounted to reversible error.

As to the second question, this Court has held that facts which increase a sentencing range must be found by the jury and proven beyond a reasonable doubt. *See Alleyne v. United States*, 570 U.S. 99, 117 (2013); *Cunningham v. California*, 549 U.S. 270, 288–89 (2007); *United States v. Booker,* 543 U.S. 220, 244 (2005); *Blakely v. Washington,* 542 U.S. 296, 313 (2004) *Apprendi v. New Jersey,* 530 U.S. 466, 490 (2000). The accuracy of the district court's calculations is irrelevant if judicial determination of extra-verdict facts was impermissible and unconstitutional. Furthermore, on appeal, potentially unconstitutional sentences are reviewed under the reasonableness standard set out by the remedial holding in *Booker*, subjecting defendants like the Petitioner to unconstitutionally enhanced sentences. This Court should grant the Petition to determine whether § 1B1.3(a)(2) of the Guidelines, which authorizes district court judges to increase a criminal defendant's sentence range based on facts not proven at trial, violates the Sixth and Fifth Amendments of the Constitution and is inconsistent with this Court's precedents in *Apprendi* and *Booker*. Alternatively, this Court should review this case to clarify lower court interpretations of *Booker* and to establish a rule that any sentence calculated with reference to § 1B1.3(a)(2) based on non-verdict facts is *per se* unreasonable.

REASONS FOR GRANTING THE WRIT

I. Certiorari Should Be Granted To Determine Whether The Government's Injection Of Racist Testimony At Trial Is A Structural Error That Warrants Automatic Reversal.

This Court should grant the petition to answer the question whether, in light of *Pena-Rodriguez v. Colorado* and *Buck v. Davis*, the structural error standard rather than the harmless-error rule should apply in reviewing the prosecution's injection of racial or ethnic stereotypes in a criminal trial.

In arguing in its opposition brief that the claim, "Cubans are always looking for money, they are looking for the easiest way to get money," was harmless-error, the Government assumes a conclusion to a question that this Court has never answered. J.A. at 49. Nowhere in its brief does the Government cite to a single case in which this Court has held that a prosecution's injection of the toxin of racist stereotypes in a criminal trial may be excused by harmless-error. To the contrary, this Court's recent decisions in *Pena-Rodriguez v. Colorado* and *Buck v. Davis* have made it clear that racial animus at trial, "if left unaddressed, would risk systemic injury to the administration of justice." *Pena-Rodriguez v. Colorado,* 137 S.Ct. 855, 868 (2017). When the prosecution relies on racist stereotypes, the harmless-error rule fails to guarantee a defendant's right to a trial free of racial bias, fails to accord equal treatment to similarly situated defendants whose constitutional rights have been violated, and fails to safeguard the very legitimacy of our criminal justice system.

Summarily, the Court should review this case to consider whether the application of the structural error standard is a more appropriate remedy for the intractable consequences of the injection of race at trial. As this Court stated in *Buck*, racist stereotyping is a toxin that can be fatal in small doses. *See Buck v. Davis,* 137 S.Ct. 759, 777 (2017). If anything, years of circuit court litigation is evidence that harmless-error

fails to cure the infection of racial bias once it is injected at trial.

A. Reviewing The Injection Of Racist Stereotypes At A Criminal Trial For Harmless-Error Is Inconsistent With *Buck v. Davis* And *Pena-Rodriguez v. Colorado.*

"The duty to confront racial animus in the justice system is not the legislature's alone. Time and again, this Court has been called upon to enforce the Constitution's guarantee against state-sponsored racial discrimination in the jury system." *Pena-Rodriguez,* 137 S.Ct. at 867. The principle that racial discrimination and criminal justice cannot coexist is as old as — and is arguably the singular achievement of — our post-bellum constitutional jurisprudence. *See Strauder v. West Virginia*, 100 U.S. 303, 312 (1879) (holding that equal protection included a prohibition against being tried by a jury from which people of color had been excluded). Since *Strauder*, the Court has repeatedly demonstrated a belief that concerns involving racial animus outweigh the concerns that underlie most procedural barriers, such as the finality of a decision and judicial efficiency. *See, e.g.*, *Aldridge v. United States*, 283 U.S. 308, 314 (1931) ("Despite the privileges accorded to the negro, we do not think that it can be said that the possibility of such prejudice is so remote as to justify the risk in forbidding [*voir dire*].").

Since Reconstruction, the Court has reinforced the need for curing the influence of racial bias in the criminal justice system. *See Vasquez v. Hillery,* 474 U.S. 254, 266 (1986) (conviction reversed where African Americans improperly excluded from a grand jury, even though petit jury reached valid verdict); *Batson v. Kentucky*, 476 U.S. 79, 100 (1986), *modified,*

Powers v. Ohio, 499 U.S. 400, 416 (1991) (conviction reversed where African Americans were excluded from a petit jury). In more recent years, the Court has played a vital role in efforts to eradicate racial bias from the judicial process. *See, e.g., Calhoun v. United States*, 133 S. Ct. 1136, 1137 (2013) (Sotomayor, J., and Breyer, J., respecting denial of certiorari) (prosecutor's racist argument to jury on issue of defendant's criminal intent is "an affront to the Constitution's guarantee of equal protection," and "offends the defendant's right to an impartial jury.").

The question of whether racially defamatory comments at trial should be considered structural error is particularly urgent in the wake of the Court's recent holdings in *Buck* and *Pena-Rodriguez*. These cases together indicate that race is an extraordinarily potent influence on a criminal trial and demonstrate the intractable nature of race in the criminal justice system. In *Buck,* the Court found that racist testimony linking the petitioner's race to future dangerousness in a capital punishment case qualified as ineffective assistance of counsel and entitled him to Fed. R. Civ. P. 60(b)(6) relief, despite overwhelming evidence of the petitioner's guilt and despite equally overwhelming evidence that petitioner had procedurally defaulted on his claims. *Buck,* 137 S.Ct. at 780. Similarly, in *Pena-Rodriguez,* the Court found that evidence of racial bias from a juror justified an exception to the no-impeachment rule, a stringent rule with a long history of strict application and very few exceptions. *See Pena-Rodriguez,* 137 S.Ct. at 875–77 (Alito, J., dissenting). This Court acknowledged that it must become "the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons. This imperative to purge racial prejudice

from the administration of justice was given new force and direction by the ratification of the Civil War Amendments." *Id*. at 867 (majority opinion).

Petitioner does not point to these cases because the facts of his case are analogous, as the Government suggests, but instead invokes these cases as evidence of the extraordinary measures the Court has recognized are appropriate to remove the toxin of racism when it is injected into a criminal trial. *See* Opp'n Br. 10–11. The question of whether the injection of race through the State's witness warrants a stricter standard than harmless-error review is one that is ripe for the Court's decision. In *Pena-Rodriguez*, the Court clarified the importance of a jury free of racial bias, and in *Buck* the Court dealt with race-based issues as applied to defense counsels. This case presents the Court with the opportunity to provide similar guidance to prosecutors with respect to their obligation to litigate cases without injecting race to poison the fairness of the judicial process.

B. The Structural Error Rule Is The Appropriate Remedy Against Racial Or Ethnic Prejudice At Trial Because The Harmless-Error Standard Is Wholly Ineffective In Enforcing The Constitutional Guarantee Against State-Sponsored Racial Discrimination.

Automatic reversal is the appropriate rule for cases where the defendant's constitutional rights are violated by the introduction of racially defamatory testimony because the harmless-error rule does not provide meaningful review to all defendants. The constitutional requirement of a fair trial is not satisfied merely by pointing to the existence in the record of evidence establishing guilt. A criminal

defendant convicted in a trial where the prosecution unfairly introduces racially biased evidence is inequitably denied the constitutional rights afforded to other litigants.

The Government cites two circuit court opinions in support of its argument for the consistent application of the harmless-error standard in race discrimination cases: *United States v. Garcia-Lagunas* and *United States v. Doe*. *See* Opp'n Br. 12. The Government's reliance on these circuit opinions is an implicit concession that this Court has yet to answer the very question raised in this petition. More importantly, these decisions demonstrate precisely how and why the harmless-error rule is useless as an antidote to the toxin of racial discrimination in the criminal justice system.

In *United States v. Garcia-Lagunas*, in a trial for conspiracy to distribute cocaine, the Fourth Circuit used the harmless-error rule to excuse the prosecution's attempt to explain for the introduction of evidence that the defendant sold a far greater quantity of drugs than charged in the indictment by invoking the ethnic stereotype that Hispanic drug traffickers send most of their proceeds back to their native countries. 835 F.3d 479, 479 (4th Cir. 2016), *cert. denied*, 137 S.Ct. 713 (2017). On the other hand, in *Doe*, the District of Columbia Circuit relied on the harmless-error rule to hold a police detective's expert testimony suggesting the monopolization of the local drug market by certain dealers due to their Jamaican ancestry was not harmless error. *United States v. Doe*, 903 F.2d 16, 17 (D.C. Cir. 1990). Both defendants were subjected to a racially tainted trial but only one of them received a cure.

These cases demonstrate that the harmless-error rule is an insufficient remedy for a violation of a

defendant's right to a trial free of racial bias and an irrational means of segregating defendants whose constitutional rights deserve protection from those whose rights apparently do not. Lastly, the harmless-error rule is a wholly ineffective tool for achieving this Court's goal to "enforce the Constitution's guarantee against state-sponsored racial discrimination." *Pena-Rodriguez*, 137 S.Ct. at 867.

On the other hand, application of the structural error rule for race-based errors remedies the main concerns raised by the harmless-error standard. An automatic reversal will assure defendants that their constitutional right to a trial free of racial bias will be protected and respected. Furthermore, the rule will avoid inconsistent outcomes based on collateral facts, and instead will provide all defendants the same remedy for the same constitutional violations that they have suffered. Most importantly, the structural error standard works to cleanse the judicial system of racial infirmity. Without an automatic reversal rule, the players of the system lack the incentive to ensure a trial based on the merits instead of racial intolerance.

C. This Case Squarely Presents The Court With The Opportunity To Apply The Structural Error Standard To Cases Where Race Or Ethnicity Is Used To Poison The Integrity Of The Trial Process.

Because the harmless-error standard is insufficient to achieve the fundamental goal of a judicial process free of racial bias, the Court should review this case and hold that the appropriate antidote to the toxin of race in a criminal trial is the structural error standard of *Arizona v. Fulminante*. 499 U.S. 279, 309–10 (1991).

When this Court first established that the harmless-error standard of review could apply to federal constitutional violations, it noted that errors cannot be deemed harmless when they "affect substantial rights" of a defendant. *Chapman v. California,* 386 U.S. 18, 23 (1967); *see also Rose v. Clark,* 478 U.S. 570, 587 (1986) (Stevens, J., concurring) ("[V]iolations of certain constitutional rights are not, and should not be, subject to harmless-error analysis because those rights protect important values that are unrelated to the truth-seeking function of the trial."). A trial free of racial bias is one such important value. Indeed, this Court has consistently found that constitutional errors that invoke racial prejudice or call into question the objectivity of the trial process are inappropriate for harmless-error analysis. *See Tumey v. Ohio,* 273 U.S. 510, 535 (1927) (reversal required for impartial judge); *Vasquez,* 474 U.S. at 264 (reversal required for racial discrimination in the selection of grand jury); *Whitus v. Georgia,* 385 U.S. 545, 553 (1967) (reversal required for racial discrimination in the selection of a petit jury). Treating the injection of race into a criminal trial as a structural error is consistent with this Court's deep-rooted understanding that the injection of racial prejudice into the criminal justice system creates a toxic mix.

The violation of Petitioner's due process and equal protection rights under the Fifth and Fourteenth Amendments invoke all three of the structural error rationales the Court recently articulated in *Weaver*: the rights at issue protect an interest other than preventing an erroneous conviction; the effects of the error are "simply too hard to measure;" and the error "always results in fundamental unfairness." 137 S.Ct. 1899, 1908

(2017). Petitioner's case gives the Court an opportunity to address trial errors where, regardless of prosecutorial intent, the objectivity of a criminal trial was compromised by racially defamatory comments elicited by the prosecutor.

First, Petitioner's Fourteenth Amendment right to equal protection protects interests that are greater than mere protection from an erroneous conviction. U.S. CONST. amend. XIV; *see Rose v. Mitchell,* 443 U.S. 545, 554 (1979) ("Discrimination on account of race was the primary evil at which the Amendments adopted after the War Between the States, including the Fourteenth Amendment, were aimed."); *see also McLaughlin v. Florida,* 379 U.S. 184, 192 (1964) ("[T]he central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States.").

Furthermore, the Court is not "at liberty to grant or withhold the benefits of equal protection, which the Constitution commands for all, merely as we may deem the defendant innocent or guilty." *Rose,* 443 U.S. at 557 (citing *Tumey,* 273 U.S. at 535). Petitioner does not argue that testimony regarding his race and ethnicity resulted in an erroneous conviction, but rather that the introduction of such testimony itself is a violation of his constitutional right to equal protection. To remedy this violation, the government can attempt a second prosecution that is free of constitutional violations. *See id.* at 557–58 (stating that unlike some Fourth or Fifth Amendment violations, reversal based on Fourteenth Amendment violations does not prevent the State from attempting a new prosecution which does not violate constitutional rights using the same evidence that achieved conviction in the first trial). Automatic

reversal will not deprive the prosecution of the chance at a valid conviction, but will ensure the defendant's constitutional rights are respected.

Second, the effects of injecting race into Petitioner's trial are indeed too hard to measure for an effective harmless-error analysis. As this Court has recognized in the context of the introduction of race as evidence of criminality, "[s]ome toxins can be deadly in small doses." *Buck,* 137 S.Ct. at 777; *see also Rose*, 443 U.S. at 559 ("Perhaps today . . . discrimination takes a form more subtle than before. But it is not less real or pernicious."). The introduction of racial bias into Petitioner's trial and the implication that he is more likely of criminality because "Cubans are always looking for money, they are looking for the easiest way to get money," could reasonably have affected the jury's perception of Petitioner and his likelihood of guilt in ways that are nearly impossible to measure. *See* J.A. at 49. Exempting the introduction of racist testimony from harmless-error review is consistent with a long line of Supreme Court cases regarding the effects of constitutional error on the "objectivity of those charged with bringing a defendant to judgment, [where] a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm." *Vasquez,* 474 U.S. at 263 (harmless-error insufficient to address the taint from a grand jury selected on the basis of race); *see also Glaser v. United States,* 315 U.S. 60, 76 (1942), *superseded by Bourjaily v. United States*, 483 U.S. 171 (1987), (stating that certain constitutional rights are "too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."); *Tumey,* 273 U.S. at 535 (reversal required without showing that bias influenced

judgment where trial judge has financial stake in conviction); *Sheppard v. Maxwell,* 384 U.S. 333, 351–52 (1966) (conviction void without showing of "essential unfairness" where jury improperly exposed to prejudicial publicity). Although the Government argues that this racially biased testimony was *de minimis* because it was one comment in a lengthy trial, here, as in *Buck,* the impact on the jury "cannot be measured simply by how much air time it received at trial or how many pages it occupies in the record." *Buck,* 137 S.Ct. at 777.

As a practical matter, asking an appellate court to use a trial transcript to determine the effect of a racist overture asks the impossible. The appellate court cannot observe the reactions of the witnesses, the defense lawyer, the prosecutor, the judge or, most importantly, the jurors to such a violation from merely reading the trial transcript. The transcript communicates only the words spoken and the evidence presented during trial. Such transcripts do not, and cannot, communicate the manner in which the words were spoken or the way in which the evidence was presented during the trial.

Finally, the error of injecting racial stereotypes into Petitioner's trial is one that always results in fundamental unfairness. "Since the beginning, the Court has held that where discrimination in violation of the Fourteenth Amendment is proved, 'the court will correct the wrong' . . . and all without regard to prejudice." *Rose,* 443 U.S. at 556 (quoting *Neal v. Delaware,* 103 U.S. 370, 394 (1880)). This Court has repeatedly recognized that "racial bias implicates unique historical, constitutional, and institutional concerns," and that efforts should be made through the courts to "ensure that our legal system remains capable of coming ever closer to the promise of equal

treatment under the law that is so central to a functioning democracy." *Pena-Rodriguez,* 137 U.S. at 868. The Court has recognized that discrimination on the basis of race in the trial setting affects fundamental rights and has no place in the judicial system; prohibiting racially biased testimony is consistent with these precedents. *See Rose,* 443 U.S. at 551, 554 (holding that racial discrimination in the selection of a grand jury is grounds for setting aside criminal conviction); *Batson,* 476 U.S. at 87 (prohibiting the exercise of peremptory challenges on the basis of race); *Wayte v. United States,* 470 U.S. 598, 608 (1985) (prohibiting the exercise of prosecutorial discretion on the basis of race). Regardless of whether the introduction of racially biased testimony leads to an erroneous conviction, the violation of an individual's Fifth and Fourteenth Amendment rights to due process and equal protection will always result in fundamental unfairness.

D. The Structural Error Standard As A Remedy Against Racial Or Ethnic Discrimination At Criminal Trial Addresses Issues Of National Significance Raised By The Insufficiency Of The Harmless-Error Rule.

The injection of race, which compromises the legitimacy of the criminal justice system, is an issue of national significance that "poisons public confidence in the evenhanded administration of justice." *Davis v. Ayala,* 135 S.Ct. 2187, 2208 (2015). A fundamental goal of the criminal justice system is to provide a process permeated by basic fairness, both to do justice for a particular defendant and to protect the legitimacy of the system. *See* U.S. CONST. amend.

VI; *see also Gomez v. United States*, 490 U.S. 858, 876 (1989) ("Among those basic fair trial rights that can never be treated as harmless is a defendant's right to an impartial adjudicator, be it judge or jury.") (internal quotation marks omitted) (quoting *Gray v. Mississippi,* 481 U.S. 648, 668 (1987). The public has a strong interest in protecting a defendant's right to a trial untainted by illegal discrimination. *See Buck*, 137 S.Ct. at 778 ("Relying on race to impose a criminal sanction poisons public confidence in the judicial process. It thus injures not just the defendant, but the law as an institution, [] the community at large, and [] the democratic ideal reflected in the processes of the courts.") (internal quotation marks omitted).

The Government contends that even though the prosecution repeatedly pressed the witness on the issue of ethnicity, the government did not "intend to elicit this answer; it twice made clear that it was not attempting to disparage persons of Cuban descent; it immediately moved on to a different line of questioning; and it did not reference Simon-Ramirez's statement during closing argument or at any other time during the trial." Opp'n Br. 8. Regardless of how intentional the elicitation of these comments was, they injected the poison of racial and ethnic stereotypes at Petitioner's trial; yet, the Government seems to imply that this is entirely permissible so long as there is enough evidence to otherwise convict a criminal defendant.

If prosecutors are free to intentionally introduce or carelessly elicit comments that implicate the guilt of entire ethnic groups as long as they have enough evidence for conviction, the harmless-error rule provides no incentive for prosecutors to avoid doing so. Prosecutors play a central role in the criminal justice system, and they enjoy something close to a

monopoly on the use of their prosecutorial authority.[2] Their decisions determine the course of the criminal process, and in making those decisions, they act with broad and mostly unregulated discretion. The structural error standard for injecting race into a criminal trial will appropriately incentivize prosecutors to avoid eliciting racially defamatory statements.

Although prosecutors enjoy an abundance of power, the Constitution does not confer unfettered discretion. The primary constraint is that the prosecutor must have "probable cause to believe that the accused committed an offense defined by [the applicable] statute." *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). Prosecutors may also not selectively prosecute individuals on the basis of race, religion, other "arbitrary classification[s]" or a protected right. *Wayte*, 470 U.S. at 608 (quoting *Bordenkircher*, 434 U.S. at 364); *see also United States v. Armstrong,* 517 U.S. 456, 464 (1996). Prosecutorial decisions based on race are reviewable by the courts under the Equal Protection Clause. *See generally, Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

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[2] "The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard." Robert H. Jackson, *U.S. Att'y Gen., Address at the Second Annual Conference of U.S. Attorneys: The Federal Prosecutor,* J. AM. JUDICATURE SOC'Y (Apr. 1, 1940), available at https://www.roberthjackson.org/speech-and-writing/the-federal-prosecutor/.

Arguments by the prosecution contrived to stimulate latent racial prejudice represent a brazen attempt to subvert a defendant's Sixth Amendment right to trial by an impartial jury. *See Berger v. United States*, 295 U.S. 78, 88 (1934) (stating that while the prosecutor "may strike hard blows, he is not at liberty to strike foul ones."). Similarly, when the prosecutor elicits racially biased testimony from a witness, that statement should also be attributable to the prosecution. This type of prosecutorial misconduct in a criminal trial is unacceptable, as the prosecutor's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Id.* at 89.

When unfettered prosecutorial power is combined with the diluted harmless-error standard, there is no incentive for prosecutors to avoid violating a defendant's constitutional right to a trial devoid of racial prejudice. In a dissent to *Darden v. Wainwright,* Justice Blackmun foresaw the very issue Petitioner raises:

> This court has several times used vigorous language in denouncing government counsel for such conduct as that of the [prosecutor] here. But, each time, it has said that, nevertheless, it would not reverse. Such an attitude of helpless piety is, I think, undesirable. It means actual condonation of counsel's alleged offense, coupled with verbal disapprobation. If we continue to do nothing practical to prevent such conduct, we should cease to disapprove it. For otherwise it will be as if we declared in effect. Government attorneys, without fear of reversal, may say just about what they please in addressing juries, for our rules on the subject are pretend -rules. If prosecutors win verdicts as a result of

> "disapproved" remarks, we will not deprive them of their victories; we will merely go through the form of expressing displeasure.

477 U.S. 168, 206 (1986) (Blackmun J., dissenting). (citing *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 661 (2d Cir. 1946)*; see also Rose,* 478 U.S. at 588–89 (Stevens, J., concurring) ("[a]n automatic application of harmless-error review in case after case, and for error after error, can only encourage prosecutors to subordinate the interest in respecting the Constitution to the ever-present and always powerful interest in obtaining a conviction in a particular case."). Subjecting these errors to structural error review will provide this much-needed incentive. Reversal of a conviction, in addition to vindicating a defendant's rights, will have a powerful punitive and educative effect on prosecuting authorities.

II. Certiorari Should Be Granted To Determine Whether Judicially Enhanced Sentences Under § 1B1.3(a)(2) Relevant Conduct Provision Of the United States Sentencing Guidelines Violates The Sixth And Fifth Amendments.

Petitioner's Sixth Amendment right to trial by an impartial jury and his Fifth Amendment right to due process of law require that a jury, and not a judge, determine the facts beyond a reasonable doubt that decide his sentence. U.S. CONST. amends. V, VI; s*ee, e.g.*, *Apprendi v. New Jersey,* 530 U.S. 466, 469 (2000). Judicial factfinding in sentencing threatens Sixth and Fifth Amendment guarantees. Thus, this Court has held facts that increase the statutory maximum, raise the mandatory minimum, or expose a defendant to a

heightened sentence range must be submitted to a jury and proven beyond a reasonable doubt, or admitted by the defendant. *See Alleyne v. United States,* 570 U.S. 99, 117 (2013); *Cunningham v. California,* 549 U.S. 270, 293 (2007); *Blakely v. Washington,* 542 U.S. 296, 313 (2004); *Apprendi,* 530 U.S. at 490.

Yet, § 1B1.3(a)(2) of the United States Sentencing Guidelines Manual ("the Guidelines") empowers district court judges to increase a criminal defendant's sentence based on facts not proven at trial nor admitted by the defendant. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(2) (U.S. SENTENCING COMM'N 2016) (hereinafter SENTENCING GUIDELINES). Indeed, § 1B1.3(a)(2) allows judges to find extra-verdict facts by a mere preponderance of the evidence. SENTENCING GUIDELINES § 6A1.3. Under § 1B1.3(a)(2), federal judges may increase sentences in a manner inconsistent with the principle set forth by the Court's holdings in *Apprendi*, *Blakely*, and *Alleyne*: juries, not judges, must determine sentencing. *See Alleyne*, 570 U.S. at 115; *Blakely*, 542 U.S. at 313; *Apprendi,* 530 U.S. at 490.

In *Apprendi*, the Court concluded that the Sixth Amendment does not allow a judge, without jury verdict support or a defendant admission, to decide a fact that would increase a defendant's sentence beyond the statutory maximum set by his offense of conviction. 530 U.S. at 490. In the years since *Apprendi*, the Court has used Sixth Amendment principles to hold unconstitutional a sentence imposed under a state sentencing scheme that empowered a judge to raise the statutory maximum range based on facts not submitted to the jury; *see Blakely*, 542 U.S. at 308; a sentence imposed under a state sentencing scheme which required the judge to

find facts that exposed a defendant to an increased sentence range; *see Cunningham*, 549 U.S. at 293; and judicial use of a federal statute to find extra-verdict facts that raise the mandatory minimum sentence. *See Alleyne*, 570 U.S. at 117–18.

In *United States v. Booker*, the Court considered the constitutionality of the Guidelines in light of *Apprendi* and *Blakely*. 543 U.S. 220, 226–27 (2005). Writing for a majority of five in a split decision, Justice Stevens confirmed that, consistent with *Blakely*, the Guidelines are subject to Sixth Amendment constitutional limits. *Id.* (Stevens, J., opinion of the Court in part). Writing for a different majority of five, Justice Breyer held that the Guidelines were advisory for district courts, and that appellate courts should assess sentences for reasonableness. *Id.* at 245, 261 (Breyer, J., opinion of the Court in part).

The *Booker* remedy notwithstanding, district court judges continue to use extra-verdict facts found by a preponderance of the evidence as sentence enhancements under § 1B1.3(a)(2). *See, e.g.*, *Jones v. United States,* 135 S.Ct. 8, 8 (2014) (Scalia, J., dissenting from the denial of certiorari). Subsequently, judicial factfinding under the Guidelines is often upheld by appellate review, in violation of the Sixth Amendment. *See Rita v. United States*, 551 U.S. 338, 369 (2007) (Scalia, J., dissenting). "[T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to [the] . . . punishment that the defendant receives — whether the statute calls them elements of the offense, sentencing factors or Mary Jane — must be found by the jury beyond a reasonable doubt." *Ring v. Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring).

The Court should find that the loss amount for purposes of the Guidelines § 2B1.1(b)(1) is an element of the underlying crime, which must be submitted to the jury and proven by the government beyond a reasonable doubt. In the alternative, the Court should find that all facts found by judges under § 1B1.3(a)(2) must be based on jury-found facts or defendant admissions.

A. The Tiered Sentencing Scheme Of §§ 2B1.1(B)(1) And 1B1.3(A)(2) Violates The Sixth Amendment By Permitting The District Court To Double Petitioner's Sentence Based On Extra-Verdict Facts.

Petitioner was sentenced by the district court judge using extra-verdict facts that were not found by the jury at trial. *See* J.A. at 66. Petitioner faced one count of conspiracy to commit mail fraud, twelve counts of mail fraud, one count of conspiracy to commit money laundering, and two counts of money laundering. J.A. at 7–19. The jury returned a general guilty verdict on all counts, without specific factual findings. J.A. at 50–53.

For a mail fraud conviction, a judge at sentencing decides which facts are "part of the same course of conduct or common scheme or plan as the offense of conviction." § 1B1.3(a)(2). The judge then turns to the tiered statutory scheme of § 2B1.1(b)(1) to calculate the level increase in a defendant's sentence based on the total amount of loss.

At Petitioner's trial, the Government presented evidence of a loss of less than $40,000, which would have set his sentence range under § 2B1.1(b)(1) to

between forty-one to fifty-one months.[3] At sentencing, the district court judge used § 1B1.3(a)(2) to find extra-verdict facts, by a preponderance of the evidence, that Petitioner's conduct caused a loss totaling $1.87 million, thereby increasing his sentence range under § 2B1.1(b)(1) to 121 to 151 months. J.A. at 66, 70. This judicial sentence enhancement violates Petitioner's Sixth Amendment right to have a jury determine the facts beyond a reasonable doubt that impose a criminal sentence.

The significant increase in Petitioner's sentence would not have been possible but-for judicial factfinding. In Petitioner's case, the finding of the increased loss amount required the judge to decide that Petitioner had participated in a scheme to defraud the government of a medical license, which then rendered all subsequent medical billings fraudulent. This alleged scheme was wholly apart from that proven at trial — namely, a scheme to fraudulently bill insurance companies for illegitimate services.[4] Indeed, the Government submitted at

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[3] Based on the testimony of prosecution witnesses, the loss amount proven at trial was $23,253. *See* J.A. at 24–43. If Petitioner's sentence was calculated using the $23,253 value, his offense level would be twenty-one. SENTENCING GUIDELINES, ch. 5, pt. A, Sentencing Table. Even under Criminal History Category II, his sentence would fall within a range of forty-one to fifty-one months. *Id.* However, the district court enhanced the loss amount to $1.87 million based on extra-verdict facts, raising the offense level to thirty-one which is a ten level increase, resulting in a sentence range of 121 to 151 months. *Id.*; J.A. at 70. Though the judge ultimately varied downward in recognition of Petitioner's military service, the 108 months he received is still significantly higher than the range to which he would have been exposed but for extra-verdict factfinding. *See* J.A. at 69–70.

[4] At trial, a United States witness testified to an amount of more than $1.87 million deposited into the V&V bank account.

Petitioner's sentencing hearing that the licensing fraud "was a violation of law" that "could have been charged as a felony." J.A. at 62. The Government presented evidence that Petitioner was "operating . . . and submitting claims through an unlicensed clinic" which was "relevant conduct that the Court may find by a preponderance of the evidence." J.A. at 60. The Court concluded that the Government had "met its burden by a preponderance of the evidence to establish an amount of loss . . . of $1,870,000."[5] J.A. at 66.

B. *Apprendi* Is Grounded In Longstanding Common Law Principles Reflecting The Original Meaning Of The Sixth And Fifth Amendments That Sentences Must Be Determined By Facts Proven At Trial.

Justice Ginsburg explained in *Cunningham* the rule that "any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt . . . is rooted in longstanding common-law practice, [yet] its explicit statement in our decisions is recent." 549 U.S. at 281.

In 2000, this Court drew a Sixth Amendment constitutional line, pursuant to which "other than the

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However, this amount was not found by the jury to be fraudulent. *See* J.A. at 50,65.

[5] The district court judge also ruled that the trial evidence supported her factfinding and that the indictment referenced the licensing fraud. J.A. at 66–67. However, the judge made no reference to the jury's verdict nor facts found specifically by the jury. The jury returned a general verdict on all counts. J.A. at 50–53. At sentencing, the district court stated: "Moreover, the essence of Defendants' argument is that the Government should have borne the burden of proving every single bill submitted by V & V was fraudulent. . . . The law does not require the Government to bear this burden." J.A. at 67–68.

fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. The *Apprendi* Court reasoned that extra-verdict facts found by a preponderance of the evidence standard to increase a defendant's criminal sentence threaten the Sixth and Fifth Amendments:

> At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without "due process of law," and the guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to speedy and public trial, by an impartial jury[.]" Taken together, these rights indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt."

Id. at 476–77 (first and third alteration in original) (citation omitted) (quoting *United States v. Gaudin,* 515 U.S. 506, 510 (1995).

The Court's reasoning was grounded on longstanding common law principles. *See Apprendi,* 530 U.S. at 477; *Alleyne,* 570 U.S. at 108 (plurality opinion). In *Apprendi*, the Court reasoned that the right to trial by jury and proof beyond a reasonable doubt "guard[s] against a spirit of oppression and tyranny on the part of rulers." 530 U.S. at 477 (quoting J. Story, *Commentaries on the Constitution of the United States* 540–41 (4th ed. 1873)). According to Justice Thomas, the right to a jury trial was grounded in the Founder's understanding of the "role of the jury as an intermediary between the State and

criminal defendants." *Alleyne*, 570 U.S. at 114. In short, "the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours." *Apprendi*, 530 U.S. at 477 (alteration in original) (emphasis omitted) (quoting 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769)). "The judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination and sentence of the law." *Id. at* 479–80 (emphasis omitted) (quoting 3 Blackstone 396).

C. The Court Has Continuously Affirmed The *Apprendi* Principle That Judicial Use Of Extra-Verdict Facts Is Prohibited By The Sixth Amendment.

In the intervening years since *Apprendi*, the Court has continued to refine the contours of Sixth and Fifth Amendment requirements for extra-verdict judicial factfinding with regard to sentencing. The doctrine makes clear that formalistic distinctions will not drive the constitutional analysis. *See, e.g.*, *Alleyne*, 570 U.S. at 114–15. ("[T]he essential Sixth Amendment inquiry is whether a fact is an element of the crime. When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury.").

The Court has repeatedly affirmed the rule of *Apprendi*, striking down statutes and sentences that permit extra-verdict facts to impose unconstitutional sentences. In *Blakely*, the Court struck down the use of a state law allowing a judge to impose a sentence

above the range authorized by facts admitted by the defendant. 542 U.S. at 305.

In *Booker*, the Court applied its Sixth Amendment jurisprudence to the Guidelines. 543 U.S. at 220. The questions before the *Booker* Court were whether an enhanced sentence authorized by the Guidelines based on judicial factfinding violated the Sixth Amendment, and, if so, whether the Guidelines in their entirety were unconstitutional. *Id.* at 226, 245. In *Booker*, the defendant was charged and convicted of possession with intent to distribute more than fifty grams of cocaine base (crack) relying on evidence presented at trial that he possessed 92.5 grams. *Id.* at 227. At sentencing, the district court concluded by a preponderance of the evidence that the defendant had possessed an additional 566 grams, which increased his maximum sentence from twenty-one years and ten months to the thirty-year sentence that the defendant received. *Id.* Justice Stevens, writing for a majority of five, found the defendant's enhanced thirty-year sentence violated the Sixth Amendment. *Id.* at 229. The Court reaffirmed the principle that "the statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Id.* at 232. (emphasis in original) (internal quotations omitted) (quoting *Blakely,* 542 U.S. at 303).

Justice Breyer wrote the remedial opinion for a different majority of five, which struck down the provisions that required judicial compliance with the Guidelines and set a *de novo* standard of appellate review to evaluate judicial compliance with the Guidelines. *Id.* at 244. Justice Breyer's majority reasoned that enhanced sentencing based on extra-verdict factfinding could be constitutional so long as

the Guidelines were advisory and resulting sentences were found reasonable on appeal. *Id.* But the Breyer majority also acknowledged that the *Booker* remedy was an imperfect and provisional one, stating that: "[o]urs, of course, is not the last word: The ball now lies in Congress' court. The National Legislature is equipped to devise and install . . . the sentencing system [that is] compatible with the Constitution." *Id.* at 265. Congress has yet to answer the call. Hence, district courts continue to impose — and circuit courts continue to uphold — enhanced sentences based on extra-verdict facts that are constitutionally unreasonable.

In his dissent, Justice Thomas criticized the remedial opinion as both over and under inclusive, reasoning that: "[t]he Constitution does not prohibit . . . binding district courts to the Guidelines," but rather "prohibits allowing a judge alone to make a finding that raises the sentence beyond the sentence that could lawfully have been imposed by reference to facts found by the jury or admitted by the defendant." *Id.* at 317–18. Justice Thomas additionally questioned the constitutionality of § 1B1.3(a)(2). *Id.* at 318. For Justice Thomas, defendant Booker's sentence violated the Sixth Amendment because the judge decided upon the amount of drugs the defendant possessed which increased the base offense level under § 1B1.3(a)(2) "above the maximum legally permitted by the jury's findings." *Id.* at 316. *Booker* is directly analogous to Petitioner's sentence, which was enhanced under § 2B1.1(b)(1) pursuant to a judicial finding under § 1B1.3(a)(2).

The *Booker* Court left open the interpretation of what constitutes a reasonable standard of review under the Guidelines. The Court in *Rita* attempted to clarify this standard, and found that the courts of

appeals may presume a sentence that is properly calculated using the Guidelines is reasonable. 551 U.S. at 341. However, *Rita* continues to leave open serious questions relating to constitutional implementation of the Guidelines, specifically with respect to extra-verdict judicial factfinding to increase sentences. *See id.* at 370 (Scalia, J., dissenting) ("The Court has reintroduced the constitutional defect that *Booker* purports to eliminate.")

Since *Booker*, this Court has continued to use the Sixth Amendment to invalidate the use of tiered sentencing structures that require judicial factfinding, rather than jury verdicts, to impose higher sentences. In *Cunningham*, the Court relied on *Blakely* to strike down the California Determinate Sentencing Law, under which a judge was required to find factors in aggravation or mitigation not considered by the jury to set the defendant's sentence. *Cunningham,* 549 U.S. at 274. The Court held the statute violated the Sixth Amendment because it authorized the judge to find facts that were "neither inherent in the jury's verdict nor embraced by the defendant's plea [and that] need only be established by a preponderance of the evidence, not beyond a reasonable doubt." *Id.*

Finally, in *Alleyne*, the Court extended the scope of the *Apprendi* rule, holding that facts that raise the mandatory minimum sentence to which a defendant is exposed must be found by the jury. 570 U.S. at 102. The defendant was sentenced by the district court to seven years based on an extra-verdict fact that the defendant brandished his weapon. *Id.* at 104. This Court reversed, finding that since brandishing "aggravates the legally prescribed range of allowable sentences, it constitutes an element of a

separate, aggravated offense that must be found by the jury." *Id.* at 115.

Taken together, the Court's eighteen-year post-*Apprendi* Sixth Amendment jurisprudence comes to this: "[t]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Cunningham*, 549 U.S. at 275 (emphasis in original) (quoting *Blakely*, 542 U.S. at 303–04 (2004). *Booker*'s dual holding has failed to address the constitutional deficiency presented in Petitioner's case: a drastic sentence increase based on extra-verdict facts. Given that the constitutional infirmities of the Guidelines addressed in *Booker* persist today, as demonstrated by Petitioner's sentence, the Court must define the constitutional limits on judicial use of § 1B1.3(a)(2) to prevent *Booker*'s temporary remedy from "rendering our Sixth Amendment law toothless." *See Cunningham*, 549 U.S. at 293.

Petitioner asks the Court to find that extra-verdict judicial factfinding under § 1B1.3(a)(2) violates the Sixth and Fifth Amendments. To remedy this constitutional violation, this Court should find that the loss amount for purposes of § 2B1.1(b)(1) is an element of the underlying crime, which must be submitted to the jury and proven by the Government beyond a reasonable doubt. Alternatively, Petitioner asks for a narrow rule that seeks to clarify the reasonableness standard of appellate review: a *per se* rule that the standard requires all facts used to impose a criminal sentence under § 1B1.3(a)(2) are found by the jury at trial and proven beyond a reasonable doubt. *See Booker,* 543 U.S. at 261 (Breyer, J., dissenting in part).

D. Five Members Of The Present Court Have Expressed Concern With The Use Of § 1B1.3(A)(2) Relevant Conduct To Increase Sentences.

Though the Court has yet to take up the precise question of the constitutionality of § 1B1.3(a)(2) under the Sixth and Fifth Amendments, five Justices of this Court have expressed support for the Sixth Amendment principle underlying *Apprendi* that would render Petitioner's sentence unconstitutional when taken to its logical conclusion. *See Apprendi,* 530 U.S. at 490.

In *Cunningham*, Justice Ginsburg stated that "[a]ny fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt." 549 U.S. at 281. Justice Thomas in his Sixth Amendment opinions has regularly noted that the right to trial by jury includes the right to have the jury consider the sentence imposed. *See Alleyne*, 570 U.S. at 109 (plurality opinion); *see also Apprendi,* 530 U.S. at 501 (Thomas, J., concurring).

Justice Sotomayor, joined by Justices Ginsburg and Kagan, explained in concurrence that "[u]nder the reasoning of our decision in *Apprendi v. New Jersey* and the original meaning of the Sixth Amendment, facts that increase the statutory minimum sentence (no less than facts that increase the statutory maximum sentence) are elements of the offense that must be found by a jury and proved beyond a reasonable doubt." *Alleyne*, 570 U.S. at 118 (Sotomayor, J., concurring); *see also*, *Peugh v. United States*, 569 U.S. 530, 550 (2013) ("Our Sixth Amendment cases have focused on when a given finding of fact is required to make a defendant legally eligible for a more severe penalty.")

Lastly, in *Cunningham,* Justice Kennedy noted that requiring factual findings by jury under the beyond a reasonable doubt standard for relevant conduct would be in line with a system of "guided discretion." 549 U.S. at 296–97 (Kennedy, J., dissenting). Specifically, Justice Kennedy suggested that *Apprendi* could be applied to "sentencing enhancements based on the nature of the offense. These would include, for example, the fact that . . . a stated amount of drugs or other contraband was involved. . . . Juries could consider these matters without serious disruption." *Id.*

For Petitioner, the extra-verdict factfinding went beyond merely deciding on the total quantity of drugs or amount of loss; rather, Petitioner's sentence required judicial finding on conduct entirely separate from the offense of conviction which served as a back door for a judicial sentence enhancement. Thus, the extent to which the courts can include relevant conduct as an extra-verdict sentence enhancement without violating a defendant's Sixth and Fifth Amendment rights is ripe for the Court's review.

Apprendi and its progeny drew a clear Sixth Amendment constitutional line at sentencing. To the extent the Guidelines crossed over the line, *Booker* crafted a provisional solution, finding the Guidelines advisory rather than mandatory and subjecting extra-verdict enhanced sentences to a reasonableness standard of review on appeal. Whatever may have been the wisdom of that compromise, the intervening fifteen years since *Booker* have unequivocally shown — as Justice Scalia lamented and Justice Thomas foretold — that until and unless the Court makes it clear that *Booke*r should not be read as an exception to the Sixth Amendment, federal district and circuit courts will continue to use the relevant conduct

provisions of § 1B1.3(a)(2) to step up to the constitutional line, cross over it, and indeed ignore it altogether.

CONCLUSION

For the foregoing reasons, we respectfully ask the Court to grant the petition to review.

Respectfully Submitted,

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April 12, 2018

APPENDIX

APPENDIX A

2015 WL 10381739 (S.D.Fla.) (Trial Pleading)
United States District Court, S.D. Florida.

UNITED STATES OF AMERICA, Plaintiff,
v.
Janio VICO and Jharildan Vico, a/k/a "Harold VICO", Defendants.

No. 15-80057-CR-Rosenberg/Hopkins(s).
August 10, 2015.

Superseding Indictment

Wifredo A. Ferrer, United States Attorney; Ellen L. Cohen, Assistant United States Attorney.

18 U.S.C. § 1349

18 U.S.C. § 1341

18 U.S.C. § 1956(h)

18 U.S.C. § 1957(a)

18 U.S.C. § 2

The Grand Jury charges that:

GENERAL ALLEGATIONS

At all times relevant to this Indictment:

1. V & V Rehabilitation Center, Inc. was a clinic located at 2290 10th Avenue North, Suites 301 & 503,

Lake Worth, Florida, 33461, in Palm Beach County, in the Southern District of Florida, that purported to offer chiropractic and massage therapy to persons who suffered injuries in automobile accidents.

2. Defendants JANIO VICO **and JHARILDAN VICO** a/k/a "Harold Vico," were not licensed chiropractic physicians.

Florida Motor Vehicle No-Fault Law

3. Florida was a "no-fault" insurance state, which required every driver to maintain insurance. Under the Florida Motor Vehicle No-Fault Law, Fla. Stat. §§ 627.730-627.7405, by requiring all drivers to maintain insurance, persons who were injured had recourse to "medical, surgical, funeral, and disability insurance benefits without regard to fault, . . . and, with respect to motor vehicle accidents, a limitation [is imposed] on the right to claim damages for pain, suffering, mental anguish, and inconvenience." Fla. Stat. § 627.731. The required insurance had to include personal injury protection ("PIP") to the named insured, relatives residing in the same household, persons operating the insured vehicle, passengers in the vehicle, and other persons struck by the vehicle who suffered bodily injury while not occupants of another vehicle to a limit of $10,000 for each such person as a result of bodily injury, sickness, disease, or death. Fla. Stat. § 627.736(1).

4. Under Florida law, the insurance provider was required to pay PIP benefits of up to $10,000 each for "accidental bodily injury" sustained by the vehicle owner and all occupants of the vehicle due to the accident. Fla. Stat. § 627.736(4) (e). The majority of

those PIP benefits were paid for medical benefits that, by law, were required to cover "[e]ighty percent of all reasonable expenses for medically necessary medical, surgical, x-ray, dental, and rehabilitative services . . . that are lawfully provided, supervised, ordered, or prescribed" by a licensed physician, licensed dentist, or licensed chiropractic physician, or that are provided by certain other approved providers, including entities wholly-owned by licensed chiropractic physicians. Fla. Stat. § 627.736(1)(a). Except in limited instances, Florida law further required that insurers pay these PIP benefits within 30 days of receipt of the claim. If an insurer failed to do so, the insurer was required to pay interest on the claim. Fla. Stat. § 627.736(4)(b), (d).

5. Florida's No-Fault Law provided that "[a]n insurer or insured is not required to pay a claim or charges . . . [f]or any service or treatment that was not lawful at the time rendered . . ." Fla. Stat. § 627.736(5)(b)(1)(b). The term "lawful" was defined in the statute as "in substantial compliance with all relevant applicable criminal, civil, and administrative requirements of state and federal law related to the provision of medical services or treatment." Fla. Stat. § 627.732(11).

6. Florida's No-Fault Law further provided that "[n]o statement of medical services may include charges for medical services of a person or entity that performed such services without possessing the valid licenses required to perform such services." Fla. Stat. § 627.736(5)(d).

7. An insurer also was not required to pay a claim or charges to "any person who knowingly submits a

false or misleading statement relating to the claim or charges." Fla. Stat. § 627.736(5)(b)(1)(c).

8. Florida's No-Fault Law required that, at "the initial treatment or service provided, each physician, other licensed professional, clinic, or other medical institution providing medical services upon which a claim for personal injury protection benefits is based shall require an insured person, or his or her guardian, to execute a disclosure and acknowledgment form, which reflects at a minimum" that services were actually rendered and the insured or his or her guardian was not solicited by anyone else to seek services from the medical provider. Fla. Stat. § 627.736(5)(e)(1). The licensed medical professional has to sign the same form. Fla. Stat. § 627.736(e)(4).

Clinic Licensing Requirements

9. In 2003, the Florida Legislature enacted the Health Care Clinic Act ("HCCA"), Fla. Stat. §§ 400.900, et seq., to strengthen the regulation of health care clinics throughout Florida. In addition to expanding the types of businesses required to obtain licenses, the HCCA required, among other things, background checks for all owners, clinic inspections and certifications, proof of financial responsibility, and higher fees to obtain licensure. These requirements were administered by the Florida Agency for Health Care Administration ("AHCA") and went into effect on July 1, 2004. The HCCA contained an exception to these stringent licensure requirements - a license was not required for a business that "provided health care services by licensed health care practitioners [including chiropractors] . . . and that is wholly owned by one or

more licensed health care practitioners . . .” Fla. Stat. § 400.9905(4)(g).

10. Under the HCCA, “it is unlawful to provide services that require licensure . . . without first obtaining ... a license.” Fla. Stat. § 408.804. It also was unlawful for an entity to offer services that required licensure without obtaining a valid

license from AHCA. Fla. Stat. § 408.812(1). The HCCA also made it “unlawful for any person or entity to own, operate, or maintain an unlicensed provider. . . . Each day of continued operation is a separate offense.” Fla. Stat. § 408.812(3).

The Automobile Insurance Companies

(The automobile insurance companies named below in paragraphs 11 through 25 below shall be known collectively as “the automobile insurance companies.)

11. Allstate Property and Casualty Company and Allstate Indemnity Company were Illinois insurance companies that offered automobile insurance in Florida, including PIP coverage.

12. Arnica Mutual Insurance was a Rhode Island insurance company that offered automobile insurance in Florida, including PIP coverage.

13. Farmers Insurance Exchange was a California insurance company that offered automobile insurance in Florida, including PIP coverage.

14. GEICO also d/b/a “Government Employees Insurance Company” was a Maryland insurance

company that offered automobile insurance in Florida, including PIP coverage.

15. Infinity Auto was an Ohio insurance company that offered automobile insurance in Florida, including PIP coverage.

16. Liberty Mutual Insurance was a Massachusetts insurance company that offered automobile insurance in Florida, including PIP coverage.

17. MGA was a Texas insurance company that offered automobile insurance in Florida, including PIP coverage.

18. National General was a Missouri insurance company that offered automobile insurance in Florida, including PIP coverage.

19. Progressive was an Ohio insurance company that offered automobile insurance in Florida, including PIP coverage.

20. Seminole Casualty Insurance was a Florida insurance company that offered automobile insurance in Florida, including PIP coverage.

21. Sentry Insurance was a Wisconsin insurance company that offered automobile insurance in Florida, including PIP coverage.

22. Star Casualty was a Florida insurance company that offered automobile insurance in Florida, including PIP coverage.

23. State Farm Fire and Casualty was an Illinois insurance company that offered automobile insurance in Florida, including PIP coverage.

24. State Farm Mutual Automobile Insurance Company was an Illinois insurance company that offered automobile insurance in Florida, including PIP coverage.

25. United Automobile Insurance was a Florida insurance company that offered automobile insurance in Florida, including PIP coverage.

COUNT 1

(Conspiracy to Commit Mail Fraud)

26. Paragraphs 1 through 25 of the General Allegations section of this Indictment are re-alleged and incorporated as though fully set forth herein.

27. From at least as early as on or about December 4, 2009, and continuing through on or about September 5, 2011, in Palm Beach County, in the Southern District of Florida, and elsewhere, the defendants,

JANIO VICO and

JHARILDAN VICO, a/k/a "Harold Vico,"

did willfully, that is, with the intent to further the object of the conspiracy, and knowingly combine, conspire, confederate, agree and reach a tacit understanding with each other and with others known and unknown to the Grand Jury, to knowingly

and with the intent to defraud, devise, and intend to devise, a scheme and artifice to defraud, and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises, knowing that such pretenses, representations and promises when made were false and fraudulent, and to knowingly cause to be delivered certain mail matter by the United States Postal Service, according to the directions thereon, for the purpose of executing the scheme and artifice to defraud, in violation of Title 18, United States Code, Section 1341.

PURPOSE AND OBJECT OF THE CONSPIRACY

28. It was the purpose and object of the conspiracy for the defendants and their co-conspirators to unlawfully enrich themselves by submitting fraudulent PIP claims for non-rendered or medically unnecessary chiropractic and massage therapy treatments for individuals who had participated in automobile accidents, many of which were staged, in an amount of more than $3 million.

MANNER AND MEANS OF THE CONSPIRACY

29. The manner and means by which the defendants and their coconspirators sought to accomplish the object and purpose of the conspiracy included, but were not limited to, the following:

a. Defendants JANIO VICO and **JHARILDAN VICO** a/k/a "Harold Vico" solicited a licensed chiropractic physician, known as J.A., to serve as the named owner of their chiropractic clinic, V & V Rehabilitation Center, Inc. The defendants, however,

maintained financial control of the clinic and made all major decisions concerning its operation.

b. Defendants **JANIO VICO** and **JHARILDAN VICO** a/k/a "Harold Vico" and persons known and unknown to the Grand Jury would recruit individuals to participate in staged automobile accidents, and would instruct these participants on how to conduct the accidents, what to tell the responding police officers, how to collect police reports, and what clinic to go to for treatment, even though the participants did not need treatment. These same defendants and persons known and unknown to the Grand Jury would also recruit individuals who had been in legitimate accidents but who had not suffered any significant injuries to attend the clinic to receive unnecessary treatment.

c. At the direction of defendants **JANIO VICO** and **JHARILDAN VICO** a/k/a "Harold Vico," J.A. prepared fraudulent chiropractic evaluations, which falsely stated that the accident participants had suffered injuries that required chiropractic and massage therapy treatments. Based on the fraudulent chiropractic evaluations, J.A. created fraudulent chiropractic and massage therapy treatment plans for the accident participants. At the direction of the defendants, J.A. prescribed the maximum number of chiropractic and massage therapy treatments available under the automobile insurance plans. The defendants, J.A., and licensed massage therapists prepared therapy note forms that falsely stated the chiropractic and massage therapy treatments were medically necessary and the patients had received treatments when, in truth and in fact, the treatments were not necessary and, in

most instances, were never received.

d. Defendants JANIO VICO and **JHARILDAN VICO** a/k/a "Harold Vico" caused the preparation of fraudulent PIP Automobile Insurance Claims, for chiropractic and massage therapy treatments which were not medically necessary and in most instances, not provided.

e. Defendants JANIO VICO and **JHARILDAN VICO** a/k/a "Harold Vico" submitted and caused to be submitted the fraudulent PIP claims to the automobile insurance companies. After processing the fraudulent claims, the automobile insurance companies sent, via United States mail, checks payable to the clinic, V & V Rehabilitation Center, Inc., for these claimed services.

f. Defendants **JANIO VICO** and **JHARILDAN VICO** a/k/a "Harold Vico" and persons known and unknown to the Grand Jury instructed the accident participants on what to say to insurance company representatives to make it appear as though the accident participants had actually needed and received therapy treatments when, in truth and in fact, they had not.

g. Defendants **JANIO VICO** and **JHARILDAN VICO** a/k/a "Harold Vico" and persons known and unknown to the Grand Jury would deposit the insurance checks into bank accounts controlled by the defendants and then convert the proceeds to cash in a variety of ways, which would be used to pay the recruiters, accident participants, clinic employees, and to enrich themselves.

h. Using these materially false and fraudulent pretenses, representations and promises, the defendants filed claims with the automobile insurance companies in an amount of at least $1,000,000.

All in violation of Title 18, United States Code, Section 1349.

COUNTS 2 THROUGH 13

(Mail Fraud)

30. Paragraphs 1 through 25 of the General Allegations section of this Indictment are re-alleged and incorporated by reference.

31. From at least as early as December 4, 2009, and continuing through September 5, 2011, in Palm Beach County, in the Southern District of Florida, and elsewhere, the defendants,

JANIO VICO, and

JHARILDAN VICO, a/k/a "Harold Vico,"

and persons known and unknown to the Grand Jury, did knowingly and with the intent to defraud, devise and intend to devise a scheme and artifice to defraud and to obtain money and property by means of materially false and fraudulent pretenses, representations, and promises, knowing that such pretenses, representations, and promises, were false and fraudulent when made, and knowingly caused to be delivered certain mail matter by the United States Postal Service, according to the directions thereon, for

the purpose of executing the scheme and artifice to defraud, in violation of Title 18, United States Code, Section 1341.

PURPOSE AND OBJECT OF THE SCHEME

32. Paragraph 28 from Count 1 is re-alleged and incorporated by reference as though fully set forth herein as a description of the purpose and object of the scheme.

USE OF THE MAILS

33. On or about the date specified as to each count below, in Palm Beach County, in the Southern District of Florida, and elsewhere, the defendants,

JANIO VICO and

JHARILDAN VICO, a/k/a "Harold Vico,"

for the purpose of executing and attempting to execute the scheme and artifice to defraud and for obtaining money and property by means of materially false and fraudulent pretenses, representations, and promises, did knowingly cause to be delivered by the United States Postal Service, according to the directions thereon, the following mail matter:

COUNT	DATE	DESCRIPTION OF MAILING
2	April 28, 2010	Check 681091935 related to PIP Claim No. 0157540030 regarding patient H.D.P. sent

		from Allstate Indemnity Company, 8711 Freeport Parkway North, Irving, TX 75063 via United States mail to V & V Rehabilitation, 2290 10th Ave., Lake Worth, Florida 33461-6618
3	April 28, 2010	Check 681091936 related to PIP Claim No. 0157540030 regarding patient H.D.P. sent from Allstate Indemnity Company, 8711 Freeport Parkway North, Irving, TX 75063via United States mail to V & V Rehabilitation, 2290 10th Ave., Lake Worth, Florida 33461-6618
4	May 11, 2010	Check 681110028 related to PIP Claim No. 0159074194 regarding patient R.C. sent from Allstate Indemnity Company, 8711 Freeport Parkway North, Irving, TX 75063 via United States mail to V & V Rehabilitation, 2290 10th Ave., Lake Worth, Florida 33461-6618
5	May 11, 2010	Check 681110029 related to PIP Claim No. 0159074194 regarding patient L.C. sent from Allstate Indemnity Company, 8711 Freeport Parkway North, Irving, TX 75063 via United States mail

		to V & V Rehabilitation, 2290 10th Ave., Lake Worth, Florida 33461-6618
6	May 13, 2010	Check 681114450 related to PIP Claim No. 0159547973 regarding patient E.A. sent from Allstate Property and Casualty Insurance Company, 8711 Freeport Parkway North, Irving, TX 75063 via United States mail to V & V Rehabilitation, 2290 10th Ave., Lake Worth, Florida 33461-6618
7	May 13, 2010	Check 681114451 related to PIP Claim No. 0159547973 regarding patient E.A. sent from Allstate Property and Casualty Insurance Company, 8711 Freeport Parkway North, Irving, TX 75063 via United States mail to V & V Rehabilitation, 2290 10th Ave., Lake Worth, Florida 33461-6618

8	May 13, 2010	Check 681114452 related to PIP Claim No. 0159547973 regarding patient E.V. sent from Allstate Property and Casualty Insurance Company, 8711 Freeport Parkway North, Irving, TX 75063 via United States mail to V & V Rehabilitation, 2290 10th Ave., Lake Worth, Florida 33461-6618
9	May 13, 2010	Check 681114453 related to PIP Claim No. 0159547973 regarding patient E.V. sent from Allstate Property and Casualty Insurance Company, 8711 Freeport Parkway North, Irving, TX 75063 via United States mail to V & V Rehabilitation, 2290 10th Ave., Lake Worth, Florida 33461-6618
10	May 18, 2010	Check 584138 related to PIP Claim No. FL-261469EXP2 regarding patient R.D.R. sent from MGA Insurance Company Inc., P.O. Box 199023, Dallas, Texas 75219-9023 via United States mail to V & V Rehabilitation, 2290 10th Ave., Lake Worth, Florida 33461-6618
11	May 18, 2010	Check 584139 related to PIP Claim No. FL-261469EXP3

		regarding patient B.L. sent from MGA Insurance Company Inc., P.O. Box 199023, Dallas, Texas 75219-9023 via United States mail to V & V Rehabilitation, 2290 10th Ave., Lake Worth, Florida 33461-6618
12	July 3, 2010	Check 591880 related to PIP Claim No. FL-263579EXP1 regarding patient F.L. sent from MGA Insurance Company Inc., P.O. Box 199023, Dallas, Texas 75219-9023 via United States mail to V & V Rehabilitation, 2290 10th Ave., Lake Worth, Florida 33461-6618
13	August 21, 2010	Check 597935 related to PIP Claim No. FL-263579EXP1 regarding patient F.L. sent from MGA Insurance Company Inc., P.O. Box 199023, Dallas, Texas 75219-9023 via United States mail to V & V Rehabilitation, 2290 10th Ave., Lake Worth, Florida 33461-6618

All in violation of Title 18, United States Code, Sections 1341 and 2.

COUNT 14

(Conspiracy To Commit Money Laundering)

34. From on or about December 4, 2009, and

continuing through on or about September 5, 2011, in Palm Beach County, in the Southern District of Florida, and elsewhere, the defendants,

JANIO VICO and

JHARILDAN VICO, a/k/a "Harold Vico,"

did knowingly combine, conspire, confederate, and agree with each other and with others, known and unknown to the Grand Jury, to commit certain offenses under Title 18, United States Code, Section 1957, namely, to knowingly engage in a monetary transaction affecting interstate and foreign commerce, by, through, and to a financial institution, in criminally derived property of a value greater than $10,000, such property having been derived from specified unlawful activity, in violation of Title 18, United States Code, Section 1957.

It is further alleged that the specified unlawful activity is conspiracy to commit mail fraud and mail fraud, in violation of Title 18, United States Code, Sections 1349 and 1341.

All in violation of Title 18, United States Code, Section 1956(h).

COUNTS 15 THROUGH 16

(Money Laundering)

35. On or about the date specified as to each count below, in Palm Beach County, in the Southern District of Florida, and elsewhere, the defendants,

JANIO VICO and

JHARILDAN VICO, a/k/a "Harold Vico,"

did knowingly engage and attempt to engage in a monetary transaction affecting interstate commerce and foreign commerce, by, through, and to a financial institution, in criminally derived property of a value greater than 10,000, and such property having been derived from specified unlawful activity, as more specifically described below:

Count	Approx. Date	Financial Transaction
15	October 15, 2010	October 15, 2010 Wire transfer from JPMC account ending #3313 in the name of Imperial Investment Management Corp in the amount of $246,245.88 payable to Kahane & Associates, P.A.
16	December 10, 2010	JPMC Cashier's check 1166503396 in the amount of $138,962.57 payable to Galvan Messick LLP, remitter Ultimate Investment Management

It is further alleged that the specified unlawful activity is conspiracy to commit mail fraud and mail fraud, in violation
of Title 18, United States Code, Sections 1349 and

1341.

In violation of Title 18, United States Code, Sections 1957 and 2.

CRIMINAL FORFEITURE

36. Upon conviction of any of the violations alleged in Counts 1-13, defendants **JANIO VICO** and **JHARILDAN VICO**, a/k/a "Harold Vico," shall forfeit to the United States all property, real and personal, which constitutes or is derived from proceeds traceable to a violation of the afore-stated offenses, including, but not limited to, the following:

a. The sum of approximately $1.4 million in United States currency representing a money judgment for the amount of proceeds received from the offenses.

b. All that lot or parcel of land, together with its buildings, appurtenances, improvements, fixtures, attachments and easements, located at 610 Cresta Circle, West Palm Beach, Florida 33413, and more particularly described as:

Lot 441, TERRACINA, JOHNSON PROPERTY, P.U.D., according to the plat thereof, as recorded in Plat Book 101, Pages 91 through 105, of the Public Records of Palm Beach County, Florida.

Parcel Identification Number: 00-42-43-33-06-000-4410.

c. All that lot or parcel of land, together with its buildings, appurtenances, improvements, fixtures,

attachments and easements, located at 669 Pacific Grove Drive, Unit #3, West Palm Beach, Florida 33401, and more particularly described as:

Unit No. 3, Building 11A, of CITYSIDE, a condominium, according to the Declaration of Condominium thereof, recorded in Official Records Book 18734, Page 669, as amended in Official Records Book 18734, Page 866 and Official Records Book 18734, Page 900, as amended, all of the Public Records of Palm Beach County, Florida.

Parcel Identification Number: 7443431731010013.

Pursuant to Title 28, United States Code, Section 2461, Title 18, United States Code, Section 981(a)(1)(C), and Title 21, United States Code, Section 853.

37. If the property described above as being subject to forfeiture, as a result of any act or omission of the defendants,

(a) cannot be located upon the exercise of due diligence;

(b) has been transferred or sold to, or deposited with a third person;

(c) has been placed beyond the jurisdiction of the Court;

(d) has been substantially diminished in value; or

(e) has been commingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), to seek forfeiture of any other property of the defendants up to the value of the above forfeitable property.

All pursuant to Title 28 United States Code, Section 2461, Title 18 United States Code, Section 981(a)(1)(C) and Title 21 United States Code, Section 853.

38. Upon conviction of any of the violations alleged in Counts 14, 15, and 16, of this Indictment, the defendants **JANIO VICO** and **JHARILDAN VICO,** a/k/a "Harold Vico," shall forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property, including, but not limited to, the following:

a. The sum of approximately $397,208.45 in United States currency representing a money judgment for the amount of proceeds involved in the offenses.

b. All that lot or parcel of land, together with its buildings, appurtenances, improvements, fixtures, attachments and easements, located at 610 Cresta Circle, West Palm Beach, Florida 33413, and more particularly described as:

Lot 441, TERRACINA, JOHNSON PROPERTY, P.U.D., according to the plat thereof, as recorded in Plat Book 101, Pages 91 through 105, of the Public Records of Palm Beach County, Florida.

Parcel Identification Number: 00-42-43-33-06-000-4410.

c. All that lot or parcel of land, together with its buildings, appurtenances, improvements, fixtures, attachments and easements, located at 669 Pacific Grove Drive, Unit #3, West Palm Beach, Florida 33401, and more particularly described as:

Unit No. 3, Building 11A, of CITYSIDE, a condominium, according to the Declaration of Condominium thereof, recorded in Official Records Book 18734, Page 669, as amended in Official Records Book 18734, Page 866 and Official Records Book 18734, Page 900, as amended, all of the Public Records of Palm Beach County, Florida.

Parcel Identification Number: 7443431731010013. Pursuant to Title 18, United States Code, Section 982(a)(1).

39. If any of the forfeitable property described in the forfeiture section of this indictment, as a result of any act or omission of the defendants,
(a) cannot be located upon the exercise of due diligence;

(b) has been transferred or sold to, or deposited with, a third person;

(c) has been placed beyond the jurisdiction of the Court;

(d) has been substantially diminished in value; or

(e) has been commingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States, pursuant to Title 21, United States Code, Section 853(p), as incorporated by Title 18, United States Code, Section 982(b)(1), to seek forfeiture of any other property of the defendants up to the value of the above forfeitable property.

All pursuant to Title 18 United States Code, Section 982 and Title 21 United States Code, Section 853. A True Bill

FOREPERSON

<<signature>>

WIFREDO A. FERRER UNITED STATES ATTORNEY
<<signature>> ELLEN L. COHEN
ASSISTANT UNITED STATES ATTORNEY

End of Document

APPENDIX B
(EXCERPTS FROM VOLUME 2 OF THE TRIAL TRANSCRIPT)

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 15-CR-80057-ROSENBERG

UNITED STATES OF AMERICA,

Plaintiff,
vs.
JANIO VICO and
JHARILDAN VICO,

West Palm Beach, FL
September 22, 2015

Defendants.

VOLUME 2

JURY TRIAL PROCEEDINGS
BEFORE THE HONORABLE ROBIN L. ROSENBERG
UNITED STATES DISTRICT JUDGE

APPEARANCES:
FOR THE PLAINTIFF: **ELLEN L. COHEN**
U.S. Attorney's Office
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561-209-1046

FOR THE DEFENDANT JANIO VICO:
HUMBERTO R.

DOMINGUEZ
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305-373-0396

FOR THE DEFENDANT JHARILDAN VICO:
SAMUEL J. MONTESINO
2161 Palm Beach Lakes
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West Palm Beach, FL 33409
561-721-3366

JEFFREY PHIFER
Direct Examination by Ms. Cohen

Government Exhibit 2 Page 125–26

***125

MS. COHEN: Your Honor, at this time the Government moves what is marked as Exhibit 2 for identification.

THE COURT: Any objection?

MR. DOMINGUEZ: No objection.

THE COURT: Either Defense?

MR. MONTESINO: No, Judge, I'm sorry, no objection.

THE COURT: All right. Exhibit 2 admitted without objection.

(Whereupon Government Exhibit 2 was marked for evidence.)

COHEN:

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Q. Okay, this is what kind of a document?

A. It is a copy of the check issued to the medical provider. In this case, that provider is whom? V & V Rehabilitation Center.

Q: And the amount of the check is how much?

A: $1,871.06.

Q: And that check was issued when?

A: Issued 4/28/10.

Q: Okay.

And it was -- does it indicate the purpose of the check?

A: It was for treatment provided to Hector Daniel Perez.

Q: For what period of time?

A: 1/25/10, through 2/5/10.

Q: That is a check that resulted directly as a result from bills submitted from V & V for services provided to Hector D. Perez?

A: Yes.

Q: Under the policy Aliuska has with Allstate?

A: Correct.

Q: Now, in addition to Hector D. Perez, did you also review documents that were -- by the way, so we are clear, does it appear that this check was negotiated, in other words, cashed?

A: Yes, ma'am.

Q: And you know that how?

A. Well, two ways I know it; one, it reflects it in the claim file that it was paid, and on the back of the check you have the stamp there from the provider.

Government Exhibit 3 Page 131

***131

MS. COHEN: I move Exhibit Number 3 into evidence, please.

THE COURT: Any objection?

MR. DOMINGUEZ: No objection.

THE COURT: I am sorry –

MR. MONTESINO: No objection.

THE COURT: Exhibit 3 admitted in evidence.
(Whereupon Government Exhibit 3 was marked for evidence.)

MS. COHEN: Your Honor, I want it to be clear that I ask permission to publish.

THE COURT: Aren't you –

MS. COHEN: I am, but I wanted it to be clear I'm asking for permission.

THE COURT: Yes.

BY MS. COHEN:

Q. All right. Number 3 is now admitted, all right. Now, this indicates what is the payment being made?

A. The amount is $1,397.03.

Q. And for what?

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A. For services that were rendered to Hector Daniel Perez on the PIP coverage.

Q. Does it give the dates of the treatment?

A. Yes, 2/5/10 through 2/16/10.

Q. Does it appear that check was negotiated?

A. Yes, ma'am.

Q. In other words, cashed?

A. Correct.

Q. All right. And does that check have a direct relationship to the claim we have been talking about?

A. Yes, ma'am.

Government Exhibit 4 Page 138

*** 138

THE COURT: Exhibit Number 4 admitted without

objection.

(Whereupon Government Exhibit 4 was marked for evidence.)

*** 139

BY MS. COHEN:

Q. Here is Exhibit 4, this is what kind of a document?

A. A check.

Q. And issued by?

A. Allstate Insurance.

Q. Issued to?

A. V & V Rehabilitation Center.

Q. And the purpose of the check was what?

A. For medical services provided to Roberto Cossio.

Q. For what dates?

Do you need me to blow it up?

A. 3/8/10 to 4/12/10.

Q. This is under his PIP coverage?

A. Correct.

Q. Related back to the accident we talked about?

A. Yes.

Q. The amount of the check?

A. $2,534.38 -- or 88 cents --

Q. 38?

A. It looks like 38 to me.

Q. And it looked like this check was likewise negotiated?

A. Yes, ma'am.

Government Exhibit 5 Page 142

*** 142

THE COURT: Exhibit 5 admitted without objection.

(Whereupon Government Exhibit 5 was marked for evidence.)

BY MS. COHEN:

Q. This is Exhibit Number 5, and this is what, sir?

A. This is an Allstate check.

Q. And this check references payments for what purpose?

A. This was for medical services for treatment provided to Lina Cossio from 3/8/2010 to 4/12/2010, under personal injury protection coverage.

Q. In what amount?

A. $2,207.86.

Q. And, Mr. Phifer, was this particular check negotiated?

A. Yes, ma'am.

Government Exhibit 6 Page 156

*** 156

THE COURT: Okay, Exhibit 6 admitted without

objection.

(Whereupon Government Exhibit 6 was marked for evidence.)

BY MS. COHEN:

Q. Okay.

Sir, I am going to ask you to look at exhibit number -- look for Exhibit Number 7, and I will put number 6 up on the

*** 157

screen for our jury to see.

There is 6, there is the document. Looking at your screen,

this is a check that covers whom?

A. Edgardo Abrego.

Q. It was for what period of time?

A. For services rendered March 16, 2010 to March 26, 2010, under personal protection coverage.

Q. The amount?

A. $1,073.73.

Q. And does it appear to have been negotiated?

A. Yes, ma'am.

Government Exhibit 7 Page 158

***158

THE COURT: In evidence without objection.

(Whereupon Government Exhibit 7 was marked for evidence.)

BY MS. COHEN:

Q. These checks, how are they delivered to V & V?

A. By U.S. Mail.

I am looking at -- we are looking at Exhibit Number 7.

There it is.

This is what kind of a document?

A. An Allstate check.

Q. And this one relates to what, sir?

A. It relates to the claim that is in question and it is for the services for Edgardo Abrego, dates of service, 3/29/2010 to 4/10, under personal protection coverage.

Q. The amount?

A. $1,217.04.

Q. Was that negotiated?

A. Yes, ma'am.

Government Exhibit 8 Page 159

*** 159

THE COURT: Number 8 admitted without objection.

(Whereupon Government Exhibit 8 was marked for evidence.)

BY MS. COHEN:

Q. Okay, that is number 8.

Let's talk about number 8. That is related to what?

A. Services for Edis Villavar, for services rendered between March 15, 2010 through 4/12/2010.

Q. These checks have been issued to what company or

*** 160

individual?

A. V & V Rehabilitation Center.

Q. This particular check is in what amount?

A. I can't tell if that is 2,227.92.

Q. Is that better?

A. It looks like $2,227.92 to me.

Q. The date of issue was what?

A. 5/13/10.

Q. And was that negotiated?

A. Yes, ma'am.

Government Exhibit 9 Page 161

*** 161

THE COURT: Okay, Exhibit 9 admitted without

objection.

(Whereupon Government Exhibit 9 was marked for evidence.)

BY MS. COHEN:

Q. So, we are looking at Exhibit Number 9. Let me bring that up on the screen.

Okay, this is likewise what kind of an item?

A. This is a check that was issued to the V & V Rehabilitation Center for Edis Villavar, March 15, 2010 through 4/12/2010, under the personal protection coverage.

Q. The date of the check is what?

A. 5/13/10.

Q. Can you read the amount?

A. $385.63.

APPENDIX C
(EXCERPTS FROM THE TRIAL TRANSCRIPT)

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 15-CR-80057-ROSENBERG

UNITED STATES OF AMERICA,

Plaintiff,
vs.
JANIO VICO and
JHARILDAN VICO,

West Palm Beach, FL
September 24, 2015

Defendants.

VOLUME 3

JURY TRIAL PROCEEDINGS
BEFORE THE HONORABLE ROBIN L. ROSENBERG
UNITED STATES DISTRICT JUDGE

APPEARANCES:
FOR THE PLAINTIFF: **ELLEN L. COHEN**
U.S. Attorney's Office
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561-209-1046

FOR THE DEFENDANT JANIO VICO:
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FOR THE DEFENDANT JHARILDAN VICO:

SAMUEL J. MONTESINO
2161 Palm Beach Lakes
Boulevard, Suite 307
West Palm Beach, FL 33409
561-721-3366

Direct Examination by Ms. Cohen Page 234

Government Exhibit 12 Page 245

*** 245

THE COURT: Okay, Exhibit 12 is admitted without objection.

(Whereupon Government Exhibit 12 was marked for evidence.)

BY MS. COHEN:

Q. So, if we look at Exhibit Number 12, sir, this check is made payable to whom?

A. V & V Rehabilitation Center.

Q. The date of the check is what?

A. January 23, 2010.

Q. The amount of the check is what?

A. $3,563.31.

Q. And was this check negotiated, in other words, cashed or deposited somewhere?

If you look down toward the lower portion of the page.

A. Yes, deposited to J.P. Morgan Chase Bank.

Q. Okay.

Does that check have a relationship to Ms. Labrada and Mr.

*** 246

Perez-Nunez's claim?

A. Yes, this check was -01, she was the first exposure, it would have been under her exposure.

Q. Ms. Labrada's?

A. Yes.

Government Exhibit 13 Page 247

*** 247

MS. COHEN: At this time the Government moves in

Exhibit 13 for identification.

THE COURT: Any objection?

MR. DOMINGUEZ: No, Judge.

THE COURT: Mr. Montesino.

MR. MONTESINO: No objection?

THE COURT: Admitted without objection.

(Whereupon Government Exhibit 13 was marked for evidence.)

BY MS. COHEN:

Q. This is a check that was payable to what

organization?

A. V & V Rehabilitation Center.

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Q. The amount of the check was what?

A. $2,041.49.

Q. The date is what?

A. August 21, 2010.

Q. The checks, do they indicate the treatment dates that are covered?

A. On the PIP log, that would have that.

Q. Okay.

And was this check negotiated, in other words, cashed?

A. Yes, it was.

Government Exhibit 10 Page 252

*** 252

MS. COHEN: Your Honor, at this time the Government

moves the admission of Government Exhibit 10.

THE COURT: Any objection?

MR. DOMINGUEZ: No.

THE COURT: Mr. Montesino?

MR. MONTESINO: No, Your Honor.

THE COURT: Admitted without objection.

(Whereupon Government Exhibit 10 was marked for evidence.)

BY MS. COHEN:

Q. This check, like the other checks, how did it get to the place they were being paid to?

A. They were sent by mail.

Q. If you look at the screen, this check is being sent pay to the order of whom?

A. V & V Rehabilitation Center.

Q. The amount being paid is how much?

A. $2,106.03.

Q. The date of the check was what?

A. May 18, 2010.

Q. And does it appear this check was negotiated?

A. Yes, I see a rubber stamp for J.P. Morgan Chase.

Q. Okay.

Government Exhibit 11 Page 253

*** 253

THE COURT: Okay, Exhibit 11 admitted without objection.

(Whereupon Government Exhibit 11 was marked for evidence.)

BY MS. COHEN:

Q. This purports to be a check written to whom?

A. V & V Rehabilitation Center.

Q. The amount of this check is how much?

A. $2,628.24.

Q. The date of this check is what?

A. May 18, 2010.

Q. Again, does this check appear to have been negotiated?

A. Yes.

APPENDIX D
(EXCERPTS OF TRIAL TRANSCRIPT)

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 15-CR-80057 -ROSENBERG

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JANIO VICO and JHARILDAN VICO,

West Palm Beach, FL
September 29, 2015

Defendants.

VOLUME 6
JURY TRIAL PROCEEDINGS
BEFORE THE HONORABLE ROBIN L. ROSENBERG UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: **ELLEN L. COHEN**
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West Palm Beach, FL 33401
561-209-1046

FOR THE DEFENDANT JANIO VICO:

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305-373-0396

FOR THE DEFENDANT JHARILDAN VICO:

SAMUEL J. MONTESINO
2161 Palm Beach Lakes
Boulevard, Suite 307
West Palm Beach, FL 33409
561-721-3366

Excerpts from Pgs. 129–32

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Q. Now, up to this point when you met Lily at V & V and Janio at V & V, had you ever met Janio before?

A. No.

Q. How long after -- well, let me back up. Did you come to an agreement that you would provide accident participants as patients for V & V?

A. Yes.

Q. And did you start providing accident participants to V & V?

A. Yes.

Q. Explain to us in some detail where you find these people that are going to be accident participants?

A. Well, this requires a follow up for some time in order to be able to have a good clientele. You go to one person and from that person you get the referral from another person, and in my case, I already had recruiters who were working for me.

Q. And did you find people from a specific part of the community to participate in these crimes?

A. Preferably that they were from here, West Palm Beach.

Q. And were they from a specific ethnic group --

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MR. MONTESINO: Objection.

THE COURT: Basis?

MR. MONTESINO: She is implicating an entire ethnic group, Judge.

MS. COHEN: I am not implicating anybody.

THE COURT: Why don't you try to rephrase your question.

BY MS. COHEN:

Q. Are you familiar with the Cuban people here in West Palm Beach?

A. Yes.

Q. What percentage of your clientele for these accidents were from the Cuban community?

A. 98 percent. I also worked with other nationalities so long as you could see they were serious people.

Q. The people that you worked with generally from the Cuban community, did they seem to know each other?

A. Not everybody knows each other.

Q. Was there a reason why 98 percent of your clientele was from the Cuban community?

MR. DOMINGUEZ: Objection, Judge --

THE COURT: Just one moment. Objection to the question? Is there an objection to the question?

MR. DOMINGUEZ: The question, lack of foundation.

THE COURT: Well, the witness has already testified to

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the percentage, so the question is, what is the reason for that percentage.

MR. DOMINGUEZ: Does he know what the reason is? You have to have a foundation.

THE COURT: You can ask the witness whether he knows first and why 98 percent came from the Cuban community.

MS. COHEN: Be happy to.

BY MS. COHEN:

Q. Mr. Simon-Ramirez, do you know why 98 percent of your clientele came from the Cuban community?

THE COURT: The answer should be yes or no first.

THE WITNESS: Yes.

BY MS. COHEN:

Q. Why?

THE COURT: Objection overruled.

THE WITNESS: Because Cubans are always looking for money, they are looking for the easiest way to get money.

MR. DOMINGUEZ: Judge, I want for the record to show the entire community is being accused here of something and the prosecution is putting that evidence forth and allowing it to go forward that way, an entire community.

THE COURT: So the objection is now to the answer?

*MR. DOMINGUEZ:*Yes, Judge, they know what the answer is. I want to reserve a motion sidebar.

THE COURT: You may reserve for that.

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Government response.

MS. COHEN: Your Honor, he indicated where it comes from, why he is getting them from here. I am not casting any aspersions nor am I suggesting the entire community is doing this.

THE COURT: Are you able to go on to next question?

MS. COHEN: Yes, I can.

THE COURT: Okay.

APPENDIX E
(EXCERPTS FROM VOLUME 14 OF THE TRIAL TRANSCRIPT)

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO. 15-CR-80057-ROSENBERG

UNITED STATES OF AMERICA,

Plaintiff,
vs.
JANIO VICO and
JHARILDAN VICO,

West Palm Beach, FL
October 13, 2015

Defendants.

VOLUME 14

JURY TRIAL PROCEEDINGS
BEFORE THE HONORABLE ROBIN L. ROSENBERG
UNITED STATES DISTRICT JUDGE

APPEARANCES:
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Excerpts from Pgs. 135–36

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We, the jury, unanimously find the Defendant, Jharildan Vico, as to Count 1, 18 U.S.C. Section 1349, conspiracy to commit mail fraud, guilty.

As to Count 2, 18 U.S.C. Section 1341, mail fraud, guilty.

As to Count 3, 18 U.S.C. Section 1341, mail fraud, guilty.

As to Count 4, 18 U.S.C. Section 1341, mail fraud, guilty.

As to Count 5, 18 U.S.C., Section 1341, mail fraud, guilty.

As to Count 6, 18 U.S.C. Section 1341, mail fraud, guilty.

As to Count 7, 18 U.S.C. Section 1341, mail fraud, guilty.

As to Count 8, 18 U.S.C. Section 1341, mail fraud, guilty.

As to Count 9, 18 U.S.C. Section 1341, mail fraud, guilty.

As to Count 10, 18 U.S.C. Section 1341, mail fraud, guilty.

As to Count 11, 18 U.S.C. Section 1341, mail fraud, guilty.

As to Count 12, 18 U.S.C. Section 1341, mail fraud,

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guilty.

As to Count 13, 18 U.S.C. Section 1341, mail fraud, guilty.

As to Count 14, 18 U.S.C. Section 1956(h), conspiracy to commit money laundering, guilty.

As to Count 15, 18 U.S.C. Section 1957, money laundering, guilty.

As to Count 16, 18 U.S.C. Section 1957, money laundering, guilty.

So say we all this 13th day of October, 2015. Walia Lopez, Foreperson.

APPENDIX F
(EXCERPTS)

SD/FLPACTS #1508091

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA
v.
JHARILDAN VICO

Docket No. 113C 9:15CR80057
Defendant No. 002
Guidelines Manual: 2015

PRESENTENCE INVESTIGATION REPORT

Prepared for: The Honorable Robin L. Rosenberg
District Court Judge

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Sentence Date: January 21, 2016,
West Palm Beach, FL

Revised 1/14/2016

Offense Level Computation

43. Count 1 charged conspiracy to commit mail fraud, in violation of 18 U.S.C. § 1349. The guideline for this offense is found in §2B1.1, by way of §2X1.1.
44. Counts 2 through 13 each charged mail fraud, in violation of 18 U.S.C. § 1341, which are found in §2B1.1.
45. Count 14 charged conspiracy to commit money laundering, in violation of 18.

U.S.C. § 1956(h), which is found in §2S1.1.

46. Counts 15 and 16 each charged money laundering, in violation of 18 U.S.C. § 1957, which is found in §2S1.1.
47. The counts of conviction involving mail fraud have been grouped, pursuant to §3D1.2(d), as the offense level is determined largely on the basis of the total amount of harm or loss. The mail fraud and money laundering counts are group, pursuant to §3D1.2(c) because one of the counts embodies conduct that treated as a specific offense characteristic, or other adjustment to, the guideline applicable to another of counts. Pursuant to §3D1.3(a), the offense level applicable to the group is the offense level, determined in accordance with Chapter Two and Parts A, B, and C of Chapter Three, for the most serious of the counts comprising the Group, i.e., the highest offense level of the counts in the Group. Therefore, §2S1.1 is to be applied, and those calculations follow.
48. Base Offense Level: Pursuant to §2S1.1(a)(1) of the Guidelines Manual, the base offense level is determined by applying the offense level for the underlying offense from which the laundered funds were derived. The offense level for the

underlying offense is as follows. Pursuant to §2B1.1(a)(1), as the defendant was convicted of an offense which has a statutory maximum term of less than 20 years, the base offense level is seven, §2B1.1(a); as the loss resulting from the defendant's offense conduct is more than $1,500,000 but not more than $3,500,000 the offense level is increased by 16 levels, §2B1.1(b)(1)(I); as the offense involved 10 or more victims, increase by 2 levels, §2B1.1(b)(2); as the offense otherwise involved sophisticated means, and the defendant intentionally engaged in or caused the conduct constituting sophisticated means, increase by 2 levels, §2B1.1(b)(10)(C). Based on the above adjustments, pursuant to §2S1.1(a)(1), the base offense level in this case is 27. **27**

49. Specific Offense Characteristics: As the offense of conviction is a violation of 18 U.S.C. § 1957, the offense level is increased by one level, §2S1.1(b)(2)(A). **+1**
50. Victim Related Adjustment: None **0**
51. Adjustment for Role in the Offense: The defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive; therefore, four levels are added, §3B1.1(a). **+4**
52. Adjustment for Obstruction of Justice: None **0**
53. Adjusted Offense Level (Subtotal): **32**
54. Chapter Four Enhancement: None **0**
55. Acceptance of Responsibility: As of completion of the presentence investigation, the defendant has not clearly demonstrated acceptance of responsibility for the offense, §3E1.1. **0**
56. Total Offense Level: **32**

APPENDIX G
(EXCERPTS OF VOLUME 16)
UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION CASE NO. 15-CR-80057-ROSENBERG

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JANIO VICO and
JHARILDAN VICO,

West Palm Beach, FL
January 21, 2016

Defendants.

VOLUME 16
SENTENCING PROCEEDINGS
BEFORE THE HONORABLE ROBIN L. ROSENBERG
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Excerpts from Pgs. 68-71

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MS. COHEN: Your Honor, what counsel has forgotten is relevant conduct under 1B1.3. The relevant conduct is running an unlicensed clinic. In addition to the statutes we cited, let me suggest you want to look at Florida Statute 408 -- excuse me, 400.9935, as well as -- let me start with that statute.

It states that, under paragraph four, in addition to

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the requirements of 408.812, any person establishing, operating or managing an unlicensed clinic, this is a statute that was in effect in 2009 and 2011, otherwise required to be licensed under this part -- let me just continue on, for any person who knowingly files a false or misleading license application or license renewal or false or misleading information related to an application commits a felony of the third degree punishable as provided in other statutes that are cited in that section.

So, when the Defendants started operating this unlicensed clinic and submitting claims through this unlicensed clinic, they were committing a felony of the third degree each and every time they filed a claim and committing a violation of law.

Consequently, we look at that and see that as relevant conduct that the Court may find by a preponderance of the evidence in this case.

Counsel has suggested that this is irrelevant, that the Grand Jury found under the particular paragraph of object and purpose of the scheme to defraud the totality of this case. If we accept that, then the jury's findings on Counts 14, 15, and 16 should be reversed on a Rule 29, and I say that because the Court very clearly in its jury instructions said you must determine that the money laundering -- the monies laundered and conspired to be laundered arose from the fraud.

And the Court will recall that the money laundering

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that we talked about occurred, for instance, in October of 2010 and December of 2010.

Counsel argued that all of the claims that we proved at trial ended long before that and we didn't trace any of it, and therefore should be limited to just that.

Well, if that is the case, then on what basis did this jury find that these Defendants had committed money laundering?

They found it on the basis of what we argued at trial, which was not an impermissible amendment of the indictment, that this was a part of the fraud.

This is how they committed the fraud, by putting up a straw owner as indicated in the preamble part discussing – of the indictment discussing what the statutes were and the manner and means, that Jennifer Adams was a straw owner of this clinic to give the facade of legitimacy so all of these claims

could be submitted and money could be obtained was how the fraud occurred. The object of any fraud is to get money. That is what they were doing.

So, when we look at a couple of things first, so I can be clear, even if the Court found that not being licensed was not part of the conspiracy, it was a violation of law. They could have been charged as a felony and, under 1B1.3, it is relevant conduct.

The Government suggests it was a part of the conspiracy and was a part of the fraud, the underlying basis of

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the fraud, and as a consequence, the entirety without regard to looking at any individual charge was based upon fraud, the fraud and facade of a legitimate clinic operating to make the insurance companies who required the health care clinics to be paid and unlicensed.

You saw that in each of the files we put before the Court.There was information provided to the insurance companies as required that this clinic was properly licensed when in fact it was not.

If the insurance companies were aware that this was not a properly licensed clinic, they would not have paid, and would not have to pay any claim, but because of that fraudulent presentation, claims were paid, whether legitimate or not, based upon the underlying fraud.

THE COURT: Okay, thank you.

I didn't ask, what witnesses, if any -- you mentioned some of the victim statements. What amount of time is the Government thinking for presentation of victim testimony and any other evidence the Government would be presenting?

MS. COHEN: I believe we need to present two people, one in regard to the objection that the Government had to the PSI, there would be one witness.

THE COURT: That is as to Mr. Janio Vico?

Excerpts from Pgs. 80-85

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MS. COHEN: There is the objection of the United States.

THE COURT: The objection relating to testimony that Mr. Janio Vico gave on the stand with respect to the argument that he perjured himself, yes, the Court needs to take that up as well.

So, let me review with you the Court's determination and ruling with respect to the objection raised to the base offense level.

The first part of what I am going to present into the record primarily focuses on the amount of loss, and then I will speak to the number of victims and the sophistication level of increase.

Defendants have cited to United States versus Evans, 155 F.3d 245, at 253, Third Circuit, 1998, for the

proposition that if the insurance companies in the instant case were not damaged, Defendants should not have their sentence augmented.

Evans does stand for that proposition, but there is more to Evans.

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In Evans, the Circuit Court noted that "to the extent any claims were legitimate and insurance companies properly obligated to pay" sentencing should not be augmented. This Court concludes that this may not be the case here insofar as V & V, as an improperly licensed business, may not have had the legal ability to submit insurance claims. Although Defendants have called into question the regulatory scheme and effect during the events in this case, the Court finds that question is ultimately rendered irrelevant.

The question is rendered irrelevant because in Evans the Circuit Court noted that it is the Government's obligation to prove by a preponderance of the evidence that the insurance companies were damaged.

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Here in the instant case, the Government has done so. The Court would note additionally that under a whole body of case law, including but not limited to United States versus Rennick, 273 F.3d 1009, Eleventh Circuit, 2001, United States versus Coffer, 199 F.3d 1270, Eleventh Circuit, a 2000 case, the guidelines do not require the Government to make a fraud loss determination with precision. The figure need only be a reasonable estimate given the information

available to the Government.

Here in the instant case, the Government has done so, that is, has proved by a preponderance of the evidence that the insurance companies were damaged.

The Government submitted evidence at trial through Nestor Mascarell that the V & V bank account received deposits from insurance companies in excess of $1.8 million. This was a result of V & V billing for approximately $3.3 million.

Under normal PIP insurance, the Court would expect to see payments from clients of approximately 20 percent of what was billed, or about $600,000. The Government submitted evidence that none of these proceeds were received. Instead, what was submitted into evidence was "other" income of around $36,000, and cash deposits of around $18,000. And in particular, the Court is referencing Government Exhibit 600.1, which contains these filings that the Court has just cited to.

These are -- these amounts are insignificant next to what should have been deposited.

The Court therefore concludes that the Government has met its burden, under Evans, to establish a prima facie case that the entire amount billed to insurance companies was fraudulent.

In response, Defendants have provided no relevant evidence. Defendants had the opportunity at trial, with Probation, at the forfeiture hearing, and at sentencing to provide evidence of bona fide transactions that may have called into doubt the

Government's contention, but Defendants have failed to do so.

The logical question, when looking at the V & V bank

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account deposits is: "Where is the money?" There should have been money collected from bona fide customers. There was none. The Court therefore concludes that the Government has met its burden by a preponderance of the evidence to establish an amount of loss, with respect to the insurance companies, of 6 $1,870,000.

To be clear, the Court has other factual bases for its finding as well. The Court finds that the evidence admitted at trial, particularly with respect to Jennifer Adams, established that Defendants created a fraudulent enterprise that had the sole purpose of engaging in fraudulent transactions. The Government produced direct evidence of this fraud. The Government produced witnesses that participated in the fraud. Although Defendants attacked the credibility of these witnesses, Defendants provided no relevant or persuasive evidence of legitimate customers or that V & V otherwise engaged in legitimate business. On this basis, the Court also concludes that all of the bills submitted to insurance companies were fraudulent.

The Court has a third basis for its finding. The Court is persuaded by the argument of the Government as advanced at the restitution hearing and at sentencing today with respect to the structure of the indictment, what was argued to the jury, and the Court adopts

and incorporates all of the arguments of the Government at the forfeiture hearing,

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that is, what was argued to the jury, and incorporates all of the arguments of the Government into its decision here today.

There is a fourth and final basis for the Court's decision. Although it is true that a Defendant is entitled to a credit against a finding of loss for any legitimate value that may have been conferred to a victim during the commission of a crime, it is also true that a "fraudster may not receive credit for value that is provided to his victims for the sole purpose of enabling him to conceal or perpetuate his scheme."

That is from U.S. v Campbell, 765 F.3d 1291, 1302, Eleventh Circuit, 2014.

The Court finds that this is exactly what occurred in this case. To the extent that any legitimate services were administered at V & V, the Court finds that these services were provided merely to conceal the conspiracy and criminal activity. The Court's finding is based upon the testimony of Jennifer Adams and the conclusion that V & V was formed for the specific purpose of allowing the Defendants to conceal their criminal activities.

Moreover, the essence of Defendants' argument is that the Government should have borne the burden of proving every single bill submitted by V & V was fraudulent and otherwise should have been investigated and vetted to determine whether any

actual value was conveyed to a client or otherwise obligated the victim insurance companies to provide some

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measure of payment. The law does not require the Government to bear this burden.

That is citing to United States versus Campbell, 765 F.3d 1291, 1304, Eleventh Circuit, 2014.

So, for those reasons, the Court overrules the objection with respect to that portion of the base offense level calculation in the Pre-Sentence Investigation Report both for Mr. Jharildan Vico at Docket Entry 161, paragraph 48, and Janio Vico at Docket Entry 156, paragraph 49 with respect to the calculation that the loss resulting from the Defendants' offense conduct is more than $1,500,000, but not more than 3,500,000, so the offense level is increased by 16 levels.

The Court does not need to make a determination of actual loss versus intended loss because the Government pointed out it would be the same 16 level increase.

With respect to whether the offense involved more than ten victims, the Court overrules the Defendants' objections with respect to the two level increase finding that, as a result of the Court's finding as to loss, the loss was incurred, at a minimum, by the 15 insurance companies that had been noted by the Government, and put that in evidence at the forfeiture hearing and was actually made part of the

record for purposes of the sentencing hearing today.

So, for all of those reasons, the Court finds the two level increase is appropriate and the objections are overruled.

Excerpts from Pgs. 151-52

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There are two distinguishing aspects of Mr. Jharildan Vico that differentiate him from Mr. Janio Vico.

One is that you, Mr. Jharildan Vico, come to this crime with a criminal history category of II, unlike your brother, and in particular, with a history that involved insurance claim fraud, and that you had been on probation from a 2008 grand theft at paragraph 59 at the time that you committed the crime in this case.

That accounts for the higher criminal history category and also speaks very much to the question of what, if any, particular sentence is appropriate to afford deterrence so that you don't continue to commit these crimes, and similarly protect the public.

You also have a mitigating factor, for lack of a better word, in your favor, and that was pointed out by counsel and contained in the PSI, and testified to by Mr. -- I want to pronounce -- Hrivnak, very eloquently and passionately. He clearly spoke from his heart about you, your family life, your role as a father, and in particular your military service.

That is something that is identified in the guidelines

under Section 5H1.11, military service may be relevant in determining whether a departure is warranted if the military service, individually or in combination with other offender

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characteristics, is present to an unusual degree from the typical cases covered by the guidelines. The Court, in consideration of 5H1.11, is going to vary downward slightly in your sentencing.

Your guideline range, as we know, after the Court calculated it with total offense level 31 and criminal history II is 121 to 151. So, the Court is going to vary downward slightly in consideration of this factor, in balancing the totality of all of the other factors in conjunction with the facts of the case and your role relative to your brother, Mr. Janio Vico.

The Court does make a finding, as well as it did with Janio Vico, you are not able to pay a fine as well as the restitution in the case so is not going to order a fine.

It is the judgment of the Court that the Defendant, Jharildan Vico, is committed to the Bureau of Prisons to be imprisoned for 108 months. This consists of terms of -- actually, it consists of 108 months as to all of the counts, all terms to run concurrently.

It is further ordered that you, Mr. Jharildan Vico, shall pay joint and several restitution with the co-defendant in the amount of $1,921,632.21.